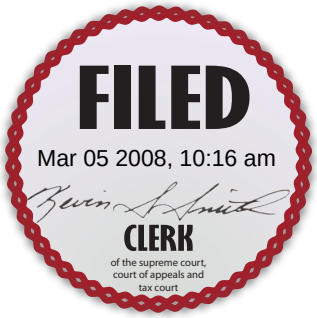

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IN THE COURT OF APPEALS OF INDIANA

KYLE J. LEWIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 91A05-0709-PC-521
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert B. Mrzlack, Judge
Cause No. 91D01-0304-FD-67

March 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Kyle J. Lewis appeals the post-conviction court's denial of his petition for post-conviction relief. Lewis raises two issues, which we restate as:

I. Whether Lewis's guilty plea was made involuntary by the State's cross examination of Lewis at the sentencing hearing where the State had agreed to make no sentencing recommendations; and

II. Whether Lewis was denied the effective assistance of trial counsel.

We affirm.

The relevant facts follow. On April 29, 2003, the State charged Lewis with criminal mischief as a class D felony[1] and alleged that Lewis had caused more than $2,500.00 in damage to his mother's residence. In October 2003, Lewis entered into a plea agreement, which provided that: (1) Lewis would plead guilty to criminal mischief as a class D felony; (2) the State would "make no recommendation as to any sentence to be imposed;" (3) Lewis could "present evidence and argument in mitigation of sentence, for probation, and for community corrections alternatives;" (4) Lewis could present evidence and argument for entry of conviction as "a Class A misdemeanor rather than as a Class D felony;" (5) the State would dismiss a pending charge for invasion of privacy; (6) Lewis would make restitution to his mother, Kathy Lewis; and (7) Lewis would reimburse the county for his pauper counsel fees. Appellant's Appendix at 10.

At the sentencing hearing, Lewis presented evidence from his mother, his stepfather, and himself. During the testimony, Lewis and his mother informed the trial

[1] Ind. Code § 35-43-1-2 (2004) (subsequently amended by Pub. L. No. 140-2006, § 33 (eff. July 1, 2006), Pub. L. No. 173-2006, § 33 (eff. July 1, 2006); and Pub. L. No. 216-2007, § 48 (eff. July 1, 2007)).

court that Lewis was attending college to become a teacher, that he had been hospitalized after the incident at his mother's residence, that he had been diagnosed with a bipolar disorder, that he was now taking medication, and that he was "going to do everything possible that [he could] to make sure that that type of episode never, ever happens again." Id. at 78. During cross examination of Lewis, the following discussion occurred between Lewis and the deputy prosecutor:

> Q Okay. Now what happens if, and that is a big if, you ever get a job teaching children, how are you going to cope with stress?
>
> A Same way every other teacher does.
>
> * * * * *
>
> Q And what if you forget your medicine one day?
>
> A That's not going to happen.
>
> Q Well did you ever think you were going to do fifteen thousand dollars worth of damage to your mother's home?
>
> A No I did not.
>
> Q Did you ever think you would threaten to kill your wife?
>
> A I guess I didn't think it would ever come to that.
>
> Q Did you ever think you would give up your parental rights?
>
> A During that time, no I didn't.
>
> Q Well, how can you sit here today and say it will never happen?
>
> A Because I know that I definitely – I need that medicine, so that is my first priority, is to take that in the morning.

Q Well let[']s say it doesn't work one day, are we going to have ten dead kids, I mean, it really concerns me?

A Suppose it doesn't work that day, I guess I don't understand your question?

Q Suppose the stress is too much for the medicine?

A I don't know how that could be. I'm not a doctor, so I can't – I can't answer that for you, sir.

Q That doesn't concern you?

A I believe I can –

Q It doesn't bother you – it doesn't bother you as a human being that you have this capability and you want to choose a line of work where you could be jeopardizing children?

A I don't feel as though that's jeopardizing children, sir.

Id. at 83-84. The State offered no argument, evidence, or recommendation regarding Lewis's sentence. Lewis's counsel asked the trial court to enter judgment as a class A misdemeanor if Lewis was successful in his probation because Lewis would be unable to become a teacher with a felony conviction.

The trial court stated:

I'm not convinced you need to be a teacher, but I'm not sure what you should do. I can control some of that by, obviously, entering judgment of conviction as the "D" felony, and I'm not sure I want to do that just yet. In fact, maybe your actions over the course of this sentence may determine whether you teach or not in the future. I am concerned, and I think Mr. Smith [the deputy prosecutor] is rightly concerned, about your ability to control yourself and take care of children. And based on what was in the pre-sentence report, as far as the police reports and the statement that you were said to have made, you are a scary individual, and I don't know if you're ever going to overcome that reputation.

Id. at 96. The trial court then sentenced Lewis to serve one and one-half years, which was suspended to probation except for two periods when Lewis was not attending college. The trial court reserved the right to enter judgment as a class A misdemeanor or a class D felony depending upon Lewis's successful completion of his sentence and probation.

Lewis appealed his sentence, and this court held, in part, that the trial court erred when "it imposed a sentence but withheld determination of whether Lewis had committed a Class D felony or a Class A misdemeanor." Lewis v. State, No. 91A02-0312-CR-1112, slip op. at 3 (Ind. Ct. App. June 3, 2004). We noted:

> Under I.C. 35-50-2-7 the court may nevertheless enter conviction as a Class A misdemeanor, stating its reasons for doing so, subject to certain exceptions which do not apply to Lewis' situation. As an alternative, the court may enter conviction for the Class D felony with the express provision that the conviction will be converted to a Class A misdemeanor within three (3) years if the person fulfills certain conditions and the prosecuting attorney consents and the person agrees to the conditions set by the court. I.C. 35-38-1-1.5 (Emphasis added).

Id.

On remand, the trial court entered judgment of conviction as a class D felony.[2] The trial court noted that the conviction would be converted to a Class A misdemeanor within three (3) years if the following conditions were met: (1) the prosecutor consented; (2) Lewis complied with all terms of his probation; (3) Lewis committed no further crimes; (4) and Lewis made full restitution to State Farm Insurance. Lewis filed a motion to correct erroneous sentence, arguing in part that the prosecutor was required to consent

at the sentencing hearing rather than a later date. The trial court found that the prosecutor's consent to class A misdemeanor treatment was required at the time of sentencing and that the prosecutor did not consent to misdemeanor treatment at the time of sentencing. The trial court corrected the sentencing order by deleting any reference to proceeding under the alternate misdemeanor sentencing statute.

In December 2006, Lewis filed a petition for post-conviction relief, arguing that his guilty plea was not knowing, intelligent, and voluntary and that he received ineffective assistance of counsel. Lewis contended that his trial counsel was ineffective because his trial counsel: (1) informed him that the prosecutor "would not say any word at the [sentencing] hearings" and would not object to alternate misdemeanor treatment; and (2) failed to object when the prosecutor cross examined Lewis and when the prosecutor objected to misdemeanor treatment at the sentence modification hearing. Appellant's Appendix at 31-23. After a hearing, the post-conviction court entered findings of fact and conclusions thereon as follows:

* * * * *

> 30. [Lewis] claims that he informed trial counsel that he wished to proceed with a jury trial and that trial counsel apparently prevented him from doing so, thereby making his eventual guilty plea involuntary. The evidence presented at the post conviction hearing failed to support this claim.
> 31. [Lewis] claims that he understood the plea agreement, which called for the State of Indiana to make no recommendation at sentencing, to mean that the State of Indiana would not say a word at the sentencing hearing. [Lewis] claims that the cross examination of defense witnesses and of himself by the deputy prosecutor at the

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[2] The record does not contain a transcript of the resentencing hearing.

sentencing hearing violated the plea agreement, and that he was prejudiced when trial counsel failed to object to the questioning.

32. The plea agreement was in writing and the terms were specific and clear. During the guilty plea hearing, [Lewis] was asked by the Court if he understood the agreement. [Lewis] stated that he did.
33. During the guilty plea hearing, [Lewis] was asked by the Court if, other than the plea agreement, anyone made any promise to him to convince him to plead guilty and he was asked if anyone forced him to plead guilty. [Lewis] answered no to both of these questions.
34. During the guilty plea hearing, [Lewis] was advised that by pleading guilty he waived his right to remain silent and that anything that he said may be used against him.
35. The deputy prosecutor, at the sentencing hearing, did cross examine and question one of the two witnesses called by [Lewis], and the deputy prosecutor also cross examined and questioned [Lewis]. [Lewis's] trial counsel did not object to this questioning.
36. At the sentencing hearing, the deputy prosecutor made no recommendation to the Court as to what sentence the Court should impose.
37. [Lewis's] evidence failed to prove that trial counsel's action or inaction prejudiced [Lewis] to such an extent that the results would have been different, but for trial counsel's action or inaction.
38. [Lewis's] evidence failed to prove that trial counsel was ineffective.
39. After considering the testimony given at the post conviction hearing; the transcript of [Lewis's] original guilty plea and sentencing hearings; and the terms of the written plea agreement; the Court finds that [Lewis's] guilty plea was made freely, knowingly and voluntarily, and that [Lewis's] evidence failed to prove otherwise.

* * * * *

40. [Lewis] has failed to meet his burden of proof with respect to the allegations contained in his Petition for Post Conviction Relief.
41. Judgment should be entered against [Lewis] and in favor of the State of Indiana in all respects.

Id. at 38-39.

Before discussing Lewis's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds

for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

I.

The first issue is whether Lewis's guilty plea was made involuntary by the State's cross examination of Lewis at the sentencing hearing where the State had agreed to make no sentencing recommendations. "An analysis of whether the promise made by the prosecutor, given in exchange for appellant's guilty plea, was breached commences with the rule stated in Santobello v. New York (1971), 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427, 433, which states: '[w]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.'" Ryan v. State, 479 N.E.2d 517, 519

(Ind. 1985). "Promises which induce guilty pleas must be fulfilled in order to satisfy the voluntariness of the guilty plea standard." Id. (citing Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472 (1970)). "Therefore, failure of the prosecutor to adhere to any promise made which induces the guilty plea would constitute a breach of the plea bargain agreement with the result that the guilty plea loses its character as a voluntary act." Id. "[D]efendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor or defense counsel will present colorable claims for relief." Cornelious v. State, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), trans. denied.

Lewis argues his guilty plea was involuntary because the deputy prosecutor breached the plea agreement, which provided that the State would "make no recommendation as to any sentence to be imposed." Appellant's Appendix at 10. According to Lewis, when the deputy prosecutor cross examined Lewis during the sentencing hearing, the deputy prosecutor breached the plea agreement by sending the trial court a "very clear message that the State did not want [Lewis] to receive misdemeanor treatment." Appellant's Brief at 17. The State points out that it did not offer an express sentencing recommendation and argues that the deputy prosecutor's cross examination of Lewis at the sentencing hearing was not a sentencing recommendation.

We have previously addressed similar circumstances. For example, in both Harris v. State, 671 N.E.2d 864, 870-871 (Ind. Ct. App. 1996), trans. denied, and Evans v. State, 751 N.E.2d 245, 247-248 (Ind. Ct. App. 2001), the State agreed in plea agreements that it would not make a sentencing recommendation. However, in both cases, police officers

addressed the trial court at the sentencing hearings. Harris, 671 N.E.2d at 870; Evans, 751 N.E.2d at 248. In both cases, we held that the officer's comments at sentencing did not represent a sentencing recommendation by the State and that the State did not violate the plea agreements. Harris, 671 N.E.2d at 871; Evans, 751 N.E.2d at 248.

Lewis cites no authority for the proposition that the State could not cross examine him at the sentencing hearing because of its agreement not to provide a sentencing recommendation. We conclude that the State did not breach the plea agreement by cross examining Lewis. The State agreed not to make a sentencing recommendation, and it abided by that agreement. See, e.g., Harris, 671 N.E.2d at 871; Evans, 751 N.E.2d at 248.

II.

The next issue is whether Lewis was denied the effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. "A reasonable probability is a probability sufficient to

undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Because Lewis was convicted pursuant to a guilty plea, we must analyze his claims under Segura v. State, 749 N.E.2d 496, 499 (Ind. 2001). Segura categorizes two main types of ineffective assistance of counsel cases. Smith v. State, 770 N.E.2d 290, 295 (Ind. 2002). The first category relates to "an unutilized defense or failure to mitigate a penalty." Willoughby v. State, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003), trans. denied. The second category relates to "an improper advisement of penal consequences," and this category has two subcategories: (1) "claims of intimidation by exaggerated penalty or enticement by an understated maximum exposure"; or (2) "claims of incorrect advice as to the law." Id.

Lewis argues that: (A) his trial counsel incorrectly gave him "the strong impression that the State would say nothing at the sentencing hearing;" and (B) his trial counsel failed to ask the trial court at the sentencing hearing to impose the conviction as a class A misdemeanor. Appellant's Brief at 19. We will address each argument separately.

A. State's Conduct at Sentencing.

The plea agreement provided that the State would "make no recommendation as to any sentence to be imposed." Appellant's Appendix at 10. Lewis testified at the post-conviction hearing that his trial counsel told him the deputy prosecutor "would say

nothing." Transcript at 13. Lewis thought "say nothing" meant that the deputy prosecutor "would sit there and say nothing" and would not be "asking questions." Id. Lewis's trial counsel denied telling Lewis that the prosecutor was prevented from calling witnesses or cross examining witnesses. Rather, Lewis's trial counsel testified that he probably told Lewis that "the State has to shut up and that the State can't tell the Court what they want to happen to him." Id. at 47.

Lewis argues that his trial counsel was ineffective for failing to inform him that the State could cross examine him during the sentencing hearing. This argument falls under the second Segura category of a claim "of incorrect advice as to the law." Willoughby, 792 N.E.2d at 563. In this category, Segura requires a "petitioner to establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to his or her decision to plead." Id. at 564. "Merely alleging that the petitioner would not have pled had the correct advice been given is insufficient." Id. "Rather, specific facts, in addition to the petitioner's conclusory allegation, must establish an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea." Id. "Consequently, analysis under this sub-category must focus on the specific facts proffered by the petitioner, which indicate that a reasonable defendant would have rejected the petitioner's plea had the petitioner's trial counsel performed adequately." Id.

Lewis presented no evidence that his trial counsel informed him that the State would be unable to cross examine him during the sentencing hearing. Rather, as the State points out, this belief came from Lewis's mistaken impression of his trial counsel's

comments. Moreover, we held above that the State did not breach the plea agreement by cross examining Lewis. See supra Part I. Finally, Lewis presented no evidence that a reasonable defendant would have rejected the plea if his trial counsel had informed him that the State could cross examine him at the sentencing hearing. We conclude that the post-conviction court's denial of Lewis's petition for post-conviction relief on this issue is not clearly erroneous. See, e.g., Segura, 749 N.E.2d at 508 (affirming the post-conviction court's denial of the petitioner's claim where the petitioner "offer[ed] nothing more than the naked allegation that his decision to plead would have been affected by counsel's advice").

B. Imposition of Class A Misdemeanor.

At the initial sentencing hearing, Lewis's trial counsel asked the trial court to enter judgment as a class A misdemeanor if Lewis was successful in his probation because Lewis would be unable to become a teacher with a felony conviction. The trial court then sentenced Lewis but reserved the right to enter judgment as a class A misdemeanor or a class D felony depending upon Lewis's successful completion of his sentence and probation. On appeal, we held that the trial court erred when "it imposed a sentence but withheld determination of whether Lewis had committed a Class D felony or a Class A misdemeanor." Lewis, No. 91A02-0312-CR-1112, slip op. at 3. We noted:

> Under I.C. 35-50-2-7 the court may nevertheless enter conviction as a Class A misdemeanor, stating its reasons for doing so, subject to certain exceptions which do not apply to Lewis' situation. As an alternative, the court may enter conviction for the Class D felony with the express provision that the conviction will be converted to a Class A misdemeanor within three (3) years if the person fulfills certain conditions and the

> prosecuting attorney consents and the person agrees to the conditions set by the court. I.C. 35-38-1-1.5 (Emphasis added).

Id. On remand, the trial court entered judgment of conviction as a class D felony.

Lewis argues that his trial counsel should have requested class A misdemeanor sentencing at the initial sentencing hearing. The post-conviction court rejected this argument and found that "[Lewis's] evidence failed to prove that trial counsel's action or inaction prejudiced [Lewis] to such an extent that the results would have been different, but for trial counsel's action or inaction." Appellant's Appendix at 39.

This argument falls under the first Segura category – the "failure to mitigate a penalty." Willoughby, 792 N.E.2d at 563. In such cases, Segura requires that "the prejudice from the omitted defense, or failure to mitigate a penalty, be measured by (1) evaluating the probability of success of the omitted defense at trial or (2) determining whether the utilization of the opportunity to mitigate a penalty likely would produce a better result for the petitioner." Id. Thus, Lewis had the burden of showing that he would have obtained a better result if his trial counsel had asked for class A misdemeanor sentencing at the initial sentencing hearing. Lewis has failed to meet this burden.

At the initial sentencing hearing, the trial court expressed concern about imposing the conviction as a class A misdemeanor. After appeal, the trial court again had the opportunity to impose Lewis's conviction as a class A misdemeanor but did not do so. Consequently, Lewis has failed to show that he would have obtained a better result if his trial counsel had asked for class A misdemeanor sentencing at the initial sentencing hearing. The post-conviction court's findings are not clearly erroneous. See, e.g.,

Reynolds v. State, 783 N.E.2d 357, 360 (Ind. Ct. App. 2003) (holding that the petitioner was "unable to show that a defense was overlooked or impaired, and in the event that one was, that there was a reasonable probability that she would have succeeded at trial").

For the foregoing reasons, we affirm the post-conviction court's denial of Lewis's petition for post-conviction relief.

Affirmed.

BARNES, J. and VAIDIK, J. concur